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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TENNESSEE RIVER PULP AND PAPER COMPANY
AND TRAVELERS INSURANCE COMPANY,
Petitioners

v.

DONALD M. SEGER, *Respondent*

On Appeal From The Supreme Court Of Mississippi

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the effect of the Mississippi Supreme Court's ruling is to deny the Petitioner its right to contract under Article I, Section 10, Clause 1 of the U.S. Constitution.

2. Whether the Mississippi Supreme Court's affirmation of the lower court's and Full Commission's actions violates the Petitioner's Due Process rights under the Fourteenth Amendment to the Constitution of the United States of America.

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OPINIONS BELOW

This case was initially decided by the Administrative Judge of the Mississippi Workmen's Compensation Commission in the Order of the Administrative Judge entered May 23, 1979. Thereafter, the Full Mississippi Workmen's Compensation Commission reversed the decision of the Administrative Judge in the Full Commission Order of the Mississippi Workmen's Compensation Commission entered October 15, 1979. Thereafter, the Circuit Court of Webster County, Mississippi, entered its Order and Opinion on December 20,

1979, affirming the Full Commission Order. Thereafter, the Mississippi Supreme Court entered its Opinion on November 26, 1980, affirming the Circuit Court of Webster County, Mississippi. Copies of all Orders and Opinions are set out in their entirety in the Appendix attached hereto.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment 14, Section 1, as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, Section 10, Clause 1, as follows:

> "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money, emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

STATEMENT OF THE CASE

The issues presented in this Petition for Writ of Certiorari deal with the constitutional rights of due process and the right to enter into legal contractual relationships without impairment through the imposition of state law, in this case the Mississippi Workmen's Compensation Act. Mississippi Code of 1972, Section 71-3-1 et seq, as set out in its entirety in the Appendix attached hereto.

The Petitioner, Tennessee River Pulp & Paper Company, engaged in the loggi g business. Its operation includes the cutting of timber, the processing and milling of lumber and wood—related materials, and the manufacture of certain wood products. In connection with its operations the Petitioner, Tennessee River Pulp & Paper Company, contracted with private individuals for the furnishing of logging services on various tracts of land (known as cut and haul contracts) as well as contracts for the sale of hardwood which Tennessee River did not use in its operation.

In the instant case, the Petitioner, Tennessee River Pulp & Paper Company, had entered into numerous contracts over a period of several years with Charles Smith. Copies of two of these contracts are set out in their entirety in the Appendix attached hereto. These contracts provided for certain requirements and specifications to be met by the contracting parties. Specifically, the following provisions were contained in each of the executed "cut and haul" contracts:

> "10(a). Neither party hereto shall have the right to cancel or terminate this agreement, prior to the date of termination heretofore fixed herein, except for a default on

the part of the other party in carrying out the terms hereof in the performance of his or its agreements and obligations hereunder. However, in the event of a default on the part of the Contractor, that is, Contractor's failure of this agreement, and if such default by him shall not have been remedied within fifteen (15) days after written notice thereof given to him by Tennessee River, then Tennessee River shall have the option, at its own and sole election, of immediately canceling and terminating this agreement, in which event written notice of such cancellation and termination shall be given to Contractor by Tennessee River. By the same token, in the event Tennessee River shall default in complying with the terms and conditions of this agreement, and its default shall not have been remedied within fifteen (15) days after written notice thereof given by Contractor, or if Tennessee River shall fail to make any payment due Contractor hereunder within fifteen (15) days after same has become due, Contractor shall have the option, at his own and sole election, of canceling and terminating this agreement by giving written notice to Tennessee River of his action in so doing."

"12. Contractor shall employ and pay his own servants, agents and employees used by him the performance of this agreement, shall be responsible for all of their acts, and shall furnish all servants, agents and employees, and all materials, merchandise, tools, equipment and machinery, necessary to cut, process and deliver the pulpwood called for by this agreement. The parties understand that Contractor is an

independent contractor, that nothing contained herein shall be construed to make Contractor an agent or employee of Tennessee River, to authorize Contractor to obligate Tennessee River or to constitute Contractor and Tennessee River joint venturers."

"15. During the term of this agreement, Contractor shall observe all rules, regulations, ordinances and laws relating to all work performed hereunder, including without limitation the Fair Labor Standards Act of 1933, as amended, and any wage and hour, Social Security, unemployment insurance or workmen's compensation law as now or hereafter in force which may be applicable. Contractor agrees to furnish Tennessee River with certificates of compliance with all such rules, regulations, ordinances and laws in such form or forms as Tennessee River may, from time to time, request; Tennessee River shall not be obligated to receive, accept or pay for any delivery of pulpwood for which such a certificate is not furnished upon request. In addition, Contractor shall secure all licenses, pay all taxes, maintain all records and make all reports and returns as may be required by the laws of the United States and of those states in which work is performed hereunder."

(See Appendix for complete contract requirements and specifications)

The Respondent, Donald M. Seger, an employee of Charles Smith, the independent logger, was injured while working on Smith's timber cutting and hauling crew. The Respondent filed a claim for workmen's

compensation benefits from the Petitioner, Tennessee River Pulp & Paper Company, and its insurance carrier, Travelers Insurance Company, claiming that he was an employee of Tennessee River.

The Administrative Judge of the Mississippi Workmen's Compensation Commission, following extensive evidentiary hearings, entered the Order of Administrative Judge denying the benefit claim. The decision was based on the contractual status of the relationship between Tennessee River and Charles Smith. In reaching his decision, the Administrative Judge stated:

> "... Smith owned his own equipment, hired, fired, paid and directed his own helpers, of which the claimant was one, paid his own expenses, cut, delivered pulpwood and hardwood pursuant to written contracts executed between Tennessee River and Charles Smith..."
>
> (See Appendix, Order of Administrative Judge)

Thereafter, the Full Mississippi Workmen's Compensation Commission, on Petition for Review, held that the Order of the Administrative Judge contained error and found "that Smith was not an independent contractor of Tennessee River Pulp & Paper Company. . .". The finding was in complete disregard of the existing and valid contractual relationship between the Petitioner, Tennessee River, and Smith and was in complete contradiction of the basic findings of fact on the part of the Administrative Judge.

The Circuit Court of Webster County, Mississippi, and Supreme Court of Mississippi affirmed the Full Commission Order. From these decisions, the Petitioners, Tennessee River Pulp & Paper Company and Travelers Insurance Company, petition this Court for issuance of a Writ of Certiorari.

ARGUMENT

Point I: The Effect Of The Mississippi Supreme Court's Ruling Is To Deny The Petitioner Its Right To Contract Under Article I, Section 10, Clause 1 Of The Constitution Of The United States Of America.

Article I, Section 10, Clause 1 of the Constitution of the United States of America provides that:

> "*No State* shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coins a tender in payment of debts; *pass any* bill of attainder, ex post facto law, or *law impairing the obligation of contracts,* or grant any title of nobility." (Emphasis added).

The Mississippi Supreme Court, by affirming the Lower Court's and Full Commission's holdings, violates the above cited constitutional provision.

Tennessee River Pulp & Paper Company (the Petitioner) had a contract with an independent logger in which the latter was to perform certain logging work in exchange for a *quid pro quo* in the form of remuneration from the Petitioner. (See Appendix, attached). The Administrative Judge properly found that this was an enforceable contract evidencing a relationship in which the Petitioner had bargained for and received the services of an independent contractor. The effect of the subsequent decisions of the Full Commission and Circuit Court affirmed by the Mississippi Supreme Court, was to deny the existence of, and thus impair the right of the Petitioner to, a contractual relationship.

The Mississippi Supreme Court extended its holding in the case of *Boyd* v. *Crosby Lumber Company,* 250

Miss. 433, 166 So. 2d 106 (1964) to an unreasonable extreme in the instant case. The ramifications of this decision are, to say the least, far-reaching. Not only have the Petitioner's rights been impaired in this instance, but the practical effects of the ruling are to completely and utterly preclude the Petitioner from exercising its right to contract in the future. Indeed, the Mississippi Supreme Court has denied all those similarly situated the right to enter into agreements with independent contractors for logging operations. The Court has virtually pronounced that the rule of law for all operations of this nature is that contractual agreements are illegal and void and only direct employment may be utilized. This is a gross violation of the Petitioner's rights.

Any law which, in its operation, amounts to a denial or obstruction of rights accruing under a contract, impairs its obligation, though it may profess to act only upon a remedy. *McCracken* v. *Hayward,* 43 U.S. 608, 11 L. Ed. 397 (1844); *Pritchard* v. *Norton,* 106 U.S. 124, 27 L. Ed. 104, 1 S. Ct. 102 (1882).

Clearly the State of Mississippi under the guise of acting upon a remedy under the Workmen's Compensation Law, has in effect impaired contractual rights and obligations of and to the Petitioner.

Even though this state action was in the form of administrative and judicial holdings, it has the same effect as if a law had been enacted. Where the authority exercised by public officials is such to make their action equivalent to a state statute, as here, then the action, if it is in conflict with private contract rights, is void. *Appleby* v. *Delaney,* 271 U.S. 403, 70 L. Ed. 1009, 46 S. Ct. 581 (1926).

The obligations of a contract are impaired by any law which renders them invalid, releases or distinguishes them, or derogates from substantial contractual rights. *Home Building & Loan Assn.* v. *Blaisdell,* 290 U.S. 398, 78 L. Ed. 413, 54 S. Ct. 231 (1934); *Thorpe* v. *Housing Authority of Durham,* 393 U.S. 268, 21 L. Ed. 2d 474, 89 S. Ct. 518 (1969). Certainly the law as erroneously pronounced by the administrative and judicial decisions in the instant case release and extinguish the contracts held by the Petitioner by ruling that they are contravened by an employer-employee relationship.

The Petitioner in no wise would deny the state's police power to promulgate and enact laws which may impair contractual relationships, where that law is based in sound discretion and reason.

> "The states must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired or even destroyed..." *United States Trust Co.* v. *New Jersey,* 431 U.S. 1, 52 L. Ed. 2d 92, at 109, 97 S. Ct. 1505 (1977).

The Petitioner would point out, however, that the state has far exceeded its power in the instant case. This Court in *United States Trust Co., supra,* after acknowledging the power vested in the states to adopt legal measures which might interfere with contractual rights, went on to say at 52 L. Ed. 2d 109:

> "Yet private contracts are not subject to unlimited modifications under the police power."

and the Court said in the same case:

> "Whether or not the protection of contract rights comports with current views of wise public policy, the contract clause remains a part of our constitution. We therefore must attempt to apply that constitutional provision to the instant case with due respect for its purpose and the prior decisions of this Court." 431 U.S. 1, 52 L. Ed. 2d 92 at 106, 97 S. Ct. 1505 (1977).

It is one thing for the Courts, as a matter of sound public policy to favor the award of workmen's compensation benefits, however, it is another thing altogether to pronounce an unreasonably broad rule of law that constitutes an absolute denial of the Petitioner's right to contract. The Mississippi Supreme Court seems to have misconceived its role and allowed its concept of what may constitute wise public policy to dominate its proper function as a reviewing court. The Mississippi Supreme Court's decision has a profound effect not only on the Petitioner's constitutional right to contract, but it also denies its common law right to do so. This is pointed out by the Petitioner to show the extent to which the Mississippi Supreme Court exceeded its role as an Appellate body. While the Workmen's Compensation Law is enacted in derogation of the common law and is to be strictly construed, it is not to be understood as affecting any change in the common law beyond that which is clearly indicated by the statute and cannot be extended by implication. *Stacy* v. *Aetna Casualty & Surety Company,* 334 F. 2d 1216 (N. D. Miss. 1971).

In *United States Trust Co., supra,* the Court cited *Blaisdell, supra,* as "the leading case in the modern

era of contract clause interpretation." The *Blaisdell* case set down the rule as follows:

> "In determining whether legislation violates the contract clause of the federal constitution, the question is not whether the legislation affects contracts incidentally or directly or indirectly, *but whether it is addressed to legitimate ends and the measures taken are reasonable and appropriate to those ends.*" 290 U.S. 398, 78 L. Ed. 413, 54 S. Ct. 231 (1934) (Emphasis added).

The Petitioner asserts that the administrative and judicial actions in the instant case can in no way be construed as reasonable or legitimate. As stated above, the practical effect of the Court's ruling is to deny the validity of contracts for the type of work involved in this case. Therefore, it would seem that the Mississippi Supreme Court has adopted a broad, all-encompassing rule of law standing for the proposition that any contract duly entered into for logging purposes is void insofar as Workmen's Compensation Laws are concerned. Such a broad pronouncement must be struck down as unconstitutional on its face.

A state cannot "adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to support them". *Blaisdell* at 290 U.S. 439.

It is clear from the foregoing argument, that the Mississippi Supreme Court's holding in this case acts to impair an entire class of contracts and is thus an unconstitutional violation of Article I, Section 10, Clause 1 of the Constitution of the United States of America. For this reason, the Mississippi Supreme Court's decision should be overruled.

Point II: The Mississippi Supreme Court's Affirmation Of The Lower Court's And Full Commission's Actions Violate The Petitioners' Due Process Rights Under The Fourteenth Amendment To The Constitution Of The United States Of America.

The rulings of the Full Commission and Lower Court as affirmed by the Mississippi Supreme Court, deny the Petitioners their procedural and substantive rights under the Fourteenth Amendment to the Constitution of the United States of America.

It has long been a sound principle of law that Appellate bodies must rule on questions of law and not of fact. The only exception to this rule is where the findings of fact are clearly erroneous. A finder of fact must be able to gauge the demeanor of witnesses and the credibility of the evidence. Whether a jury is involved as trier of fact, or whether it is a trial judge, an administrative judge, or a panel of commissioners, the benefits of hearing testimony and observing witnesses are an essential aid in determining what is fact and what is fiction.

While Mississippi law provides that the Full Workmen's Compensation is to be the ultimate finder of fact, in the instant case the Commissioners placed themselves in the position of an appellate forum. The Administrative Judge viewed the witnesses first hand, had the benefit of listening to testimony and voice inflection, and observing the demeanor of the witnesses and made his findings of fact based upon these benefits and the evidence adduced.

The Full Commission then heard argument from counsel, viewed the record below them and then proceeded to not only rule on the law, but fundamentally altered the findings of fact in reversing the Adminis-

trative Judge. In short, the Full Commission determined ultimate issues of fact based on what was, in effect, an appellate record. The Full Commission made no ruling to the effect that the Administrative Judge's findings of fact were clearly erroneous. It is clear that the Full Commission's actions in this regard constituted an absolute denial of the Petitioners' fundamental rights to procedural due process under the Fourteenth Amendment to the United States Constitution.

To be sure, Workmen's Compensation Laws are given liberal construction by the Courts. However, to ignore the existence of actual facts in order to bring a case under the statute and allow benefits without an additional evidentiary hearing as a basis, is totally unjustifiable. Such actions must be reversed to preserve the constitutional guarantees to the Petitioners of procedural due process and basic fair play.

Procedural due process is recognized as a fundamental right of both the employee, *Auxier* v. *Woodard State Hospital-School,* 266 N.W. 2d 139 (Iowa 1978) cert. denied 439 U.S. 930, 58 L. Ed. 2d 324, 99 S. Ct. 319, and the employer, *Pennsylvania Coal Mining Assn.* v. *Insurance Dept.,* 471 Pa. 437, 370 A. 2d 685 (1977), under Workmen's Compensation Acts.

The Petitioners are not simply arguing that common law and statutory rules of evidence were denied them, nor are they simply asserting that technical or formal rules of procedure were not observed. Not only have the Petitioners been denied the benefits of their rights under these safeguards, but, even more fundamentally important, they have been denied the minimal demands of fair play and basic principles inherent in due process of law. Such a denial demands that the administra-

tive and judicial actions be overturned. *Colter* v. *Einbinder,* 184 F. Supp. 523 (D.D.C. 1960).

In addition to ignoring the Petitioners' constitutional right to procedural due process, the Mississippi Supreme Court, in affirming the decisions of the Full Commission and Lower Court, has denied the Petitioners their substantive due process rights under the Fourteenth Amendment and Article I, Section 10, Clause 1 of the United States Constitution.

Freedom to contract is a basic part of the liberty protected by the Fourteenth Amendment. *Advance-Rumely Thresher Co.* v. *Jackson,* 287 U.S. 283, 77 L. Ed. 306, 53 S. Ct. 133 (1932).

The Due Process Clause of the Fourteenth Amendment denies to a state any power to restrict or control the obligations of contracts, *Bayside Fish Flour Company* v. *Gentry,* 297 U.S. 422, 80 L. Ed. 772, 56 S. Ct. 513 (1936). See also Article I, Section 10, Clause 1, U.S. Constitution; and *Alaska Packer's Assn.* v. *Industrial Accident Co.,* 294 U.S. 532, 79 L. Ed. 1044, 55 S. Ct. 518 (1935).

The effect of the state action in the instant case is to impair the contractual obligations of the Petitioners. This has been fully discussed under the Petitioners' first point of argument. Such state action is repugnant to the Constitution of the United States of America, in particular it violates Article I, Section 10, Clause 1 and the Fourteenth Amendment's Due Process Clause. Therefore, the actions of the Mississippi Supreme Court, the Lower State Court and the Mississippi Workmen's Compensation Commission, must be overturned and their decisions reversed.

CONCLUSION

The Court should review this case because of the fundamental right to contract and due process issues apparent in the decisions of the Full Mississippi Workmen's Compensation Commission, the Circuit Court of Webster County, Mississippi, and the Mississippi Supreme Court. The Petitioners would respectfully petition for the granting of a Writ of Certiorari for the reasons as set forth herein.

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APPENDIX

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APPENDIX

MISSISSIPPI WORKMEN'S COMPENSATION COMMISSION

MWCC No. 77 09779-B-6996

DONALD M. SEGER, Claimant

vs.

TENNESSEE RIVER PULP & PAPER COMPANY, Employer

and

THE TRAVELERS INSURANCE COMPANY, Carrier

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Appearing for Defendants:

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Honorable Fred B. Smith, Attorney at Law, Ripley, Mississippi

ORDER OF ADMINISTRATIVE JUDGE

Hearings were held in Walthall, Mississippi, on the application of Donald M. Seger, claimant, for benefits under the provisions of the Mississippi Workmen's Compensation Act, as amended, for an accidental injury that occurred on or about September 3, 1976.

At the outset, the claimant moved for penalties and interest, nursing services and medical service.

The claimant called Charles Smith, who testified that the claimant was employed in his work crew at an average

weekly wage of $125.00 per week, plus transportation to and from work, plus lunch which would cost $.75 to $1.00. Mr. Smith testified he learned of the accident the morning it happened in Webster County on the Tennessee River Pulp & Paper Company property, at which time the claimant was cutting timber. Mr. Smith stated that he had worked as an independent contractor for several years buying hardwood from the defendant, Tennessee River Pulp & Paper Company, selling pine timber to the defendant, working the pine timber that the defendant bought and Mr. Smith bought. Mr. Smith testified that the claimant worked for around three weeks for him, during which time they had moved from a Williams' place to the site of the subject accident. In addition, Mr. Smith testified that during that period of time hardwood had been delivered to a Charles Herrington, Pylon Company, and S & Y Company. Mr. Smith further testified that under the contract he had with the defendant, the defendant had the right to inspect out in the woods to see if the timber was being cut according to the contractual specifications and that, according to the contract, the defendant designated pine timber to be cut. Mr. Smith further testified that he could not afford Workmen's Compensation insurance and did not have any Workmen's Compensation coverage for that reason. Mr. Smith had two trucks, one skidder, and one loader at the time the claimant was employed. A timber contract, production records and copies of checks (payments for loads delivered) were introduced into evidence. Mr. Smith stated that he was paid by the defendant on each load at the time he dropped the load. Also, he withheld income tax from the claimant's pay and that he paid the claimant's Social Security tax in addition to the $125.00 per week. On cross-examination, Mr. Smith testified that he had been self-employed for approximately ten years timber cutting and hauling. In addition, he farmed. This witness further testified that at the time the claimant was hired he told the claimant he would be paid around $3.00 an hour or $25.00

a day and that the claimant would be doing whatever came up. The claimant worked for Mr. Smith two full weeks and part of another week when he was hurt on a Thursday. Smith purchased hardwood on the land of the defendant and sold this hardwood to whomever he wanted to. In addition, Smith cut and hauled for others and dealt with others. When dealing with the defendant, he dealt with a Tony Bacon and further testified that he (Smith) directed the manner in which the work was to be performed, and the defendant exercised no control over his employees, although the defendant would mark off the area and trees within a certain tract. Smith's employees were told by him as to what stump size to cut. Further, Mr. Smith stated he could fire the claimant and any of the other employees whenever he wanted to, and the defendant employer had nothing to do with hiring and firing of his employees.

Donald M. Seger, claimant, age 45, testified that he had an eighth grade education and prior employment was with the town of Eupora. Mr. Seger testified that prior to the date of the accident his health was good although he had a history of epilepsy which was controlled by medication. Further, Mr. Seger testified that on the date of the accident they were tree cutting when he was struck by a falling tree and was thereafter taken to Eupora Hospital, the V.A. Hospital in Jackson and the V.A. Hospital in Memphis, Tennessee. Presently, Mr. Seger is drawing Social Security benefits. The claimant testified that on three different times someone from the defendant employer came out and told where to cut and that Mr. Smith was not present at that time. Claimant testified that someone has to be with him 24 hours a day because of his condition. On cross-examination, this claimant revealed that he had had epilepsy all of his life, for which he took medication.

Kenneth Burton testified he was on the job on the date of subject accident and his duty was driving a skidder for Charles Smith. Mr. Burton found the claimant laying un-

der a top of a tree and another employee, Wayne White, was about 100 yards off. Further, this witness revealed that the defendant would come out and inspect the timber and tell if any logs had been missed. On cross-examination, this witness testified he was employed by Charles Smith and had been so employed off and on for approximately seven years. Wayne White was a timber cutter and was on the job at the time of the accident. Mr. Burton further testified that Charles Smith employed him and paid him in cash for his services and exercised control and the manner in which the work was done.

For the defendant, Charles Boyd Smith, Jr., testified he worked for his father, Charles Wesley Smith, for four or five years and was present the day the claimant was hurt. Prior thereto they had been cutting hardwood on Sonny Williams' place, and it was taken to Pylon Company and to Houston, Mississippi. After the Williams' tract, they started on the tract owned by the defendant, and his father gave all the instructions as to the work to be performed. On cross-examination, this witness testified his duties were driving the log truck and on the Sonny Williams' tract, the timber was bought by the thousand. In addition, this witness testified when they would be near finishing a job, the defendant would come in and check to see if all merchantable timber had been cut according to the contractual specifications.

Charles Smith was recalled by the defendant, at which time he testified that on the Williams' track, he bought the timber and paid for it by the thousand, and the pine was sold to the defendant and the hardwood to S & Y Company. Then, while working on the defendant's property, the hardwood was delivered to a Charles Herrington and the pine was sold to the defendant. Mr. Smith stated that the defendant did not tell when to start or when to quit a job, only perform according to the contractual specifications. The defendant did have the right to check and scale the

hardwood to determine if they were getting their share of the stumpage. On cross-examination, Mr. Smith testified that, as he was finishing a job, he would call the defendant to inspect to determine if the contractual specifications had been adhered to.

There was introduced a stipulation by the parties that should Dr. Charles A. Osborn he called to testify for and in behalf of the claimant, his testimony would be in accordance with his letter of September 11, 1978, the same introduced into evidence wherein Dr. Ozborn stated that it was his opinion the care of the claimant because of his paraplegia would require approximately 16 hours a day. In addition, there were housing requirements and transportation requirements.

For the defendant, Lamar Jarvis testified that he was employed with the defendant as a procurement forester which included buying timber and supplying the pulpwood yard with the timber. This witness testified that the only time he was on subject job was for a stumpage scale inspection. He did not recall an instance of a hornets' nest.

Donald Neal testified he was hired as a timberland field assistant, his duties being painting boundary lines and assisting in a sale and so forth. Mr. Neal testified he knew the tract of land on which the claimant was injured and was on the tract after Charles Smith started cutting timber. He checked this tract to see if the timber had been cut according to the contractual specifications, and, in addition, he recalled the incident of the hornets' nest, when a hornets' nest was pointed out and hollered to each other about the hornets' nest. On cross-examination, this witness testified he learned about the injury approximately a year after it happened. Mr. Neal testified the Tennessee River owned the land on which the claimant was hurt, but Charles Smith had the contract to cut the timber, and that Charles Smith was paid upon delivery of every load just like every other

contractor. Mr. Neal testified he marked the boundaries on the subject tract.

Tony Bacon, district supervisor and procurement forester with the defendant, Tennessee River, testified he was familiar with the tract of land on which the claimant was hurt since he had negotiated the contract with Charles Smith to cut and haul the pine and sold the hardwood stumpage to Mr. Smith. Mr. Bacon testified he did not believe he went back on the tract after Charles Smith started cutting the timber; however, he did have the right to inspect to see if the timber was being cut in accordance with the contract and that this was done with every contractor. The witness further testified that he gave no instructions to Smith and had no control over Smith in that Smith contracted with other firms to cut and haul timber too. On cross-examination, Mr. Bacon stated that, under the contract, he could inspect the scaling of hardwood and that the timber became Smith's when he signed the contract. In addition, Mr. Bacon testified that no services were provided for the contractor, and it did not matter with the defendant where Smith would haul his hardwood.

The deposition of Dr. Claude H. Workman was introduced into evidence, Dr. Workman having a post-graduate course in spinal cord injury and belonging to the American Paraplegic Society. Dr. Workman testified he first saw the claimant on September 10, 1976, for paralysis of the lower extremities and that the claimant had lost control of bowel and bladder movement. It was Dr. Workman's opinion that the claimant was permanently and totally disabled from the date of the accident, and he needs nursing services for approximately an hour a day if he is well; however, if the claimant is ill, he will need those services 24 hours a day. On cross-examination, Dr. Workman testified that the claimant was operated on by a Dr. Metz, an orthopedic surgeon, and Dr. Workman was of the opinion that no further operative procedure was necessary.

The deposition of Dr. Charles W. Metz, Jr., a specialist in orthopedic surgery practicing at the V.A. Hospital in Memphis, Tennessee, was introduced into evidence, wherein Dr. Metz testified he first saw the claimant in early September of 1977, and on September 16, 1977, an open reduction of the complete dislocation of the bodies of L-3 on L-4 was done with insertion of Harrington rods to hold the reduction. Although Dr. Metz testifies in his deposition that this was done on September 16, 1977, it is my opinion that probably this is an error since Dr. Metz goes on to testify that he last saw the claimant on November 10, 1976; therefore, it would be reasonable to assume that Dr. Metz meant he performed the open reduction on September 16, 1976, rather than September 16, 1977.

Findings of Fact

Having heard and considered all of the evidence presented in this cause, both oral and documentary, which said evidence is considered to be substantial, and having observed the demeanor of the claimant and the witnesses in this cause, and having studied the very *excellent* briefs submitted by counsel for both parties, I hereby make the following findings of fact, to-wit:

1. That at the time of the injury, claimant had an average wage of $125.00, plus lunches, plus transportation to and from the job site, plus Social Security payments;

2. That as a direct result of his accident of September 3, 1976, the claimant is permanently and totally disabled and has been so since the date of the accident;

3. That as a direct result of his accident, the claimant is a paraplegic in need of certain nursing services performed by claimant's wife, which are separate from her general household duties and work she ordinarily performs in and about the home;

4. That the claimant was an employee of Charles Smith at the time of the injury;

5. That Smith owned his own equipment, hired, fired, paid and directed his own helpers, of which the claimant was one, paid his own expenses, cut, delivered pulpwood and hardwood pursuant to written contracts executed between Tennessee River and Charles Smith, and that Smith was involved with other customers, other buy/sell agreements, other tracts of land. Smith was paid for each load at the time of delivery to Tennessee River; that Smith was independent in every respect from any control or right of control by Tennessee River, who exercised no control or right of control over Smith, the claimant, or the working process, except to investigate on occasion the work site to determine that the terms of the written contract were being carried out. In addition, the claimant was employed and paid by Smith. The claimant was under the exclusive orders and control of work assignments by Mr. Smith. Tennessee River had no control over the hiring or work assignments of Smith's employees. Finally, Smith paid the Social Security and income tax deductions on the claimant, and Smith operated both a cut and haul operation and a hardwood selling operation, and, in fact, sold to various individuals during the contract periods with Tennessee River.

Order

IT IS, THEREFORE, ORDERED that the claim of Donald M. Seger, claimant, against Tennessee River Pulp & Paper Company, employer, and The Travelers Insurance Company, carrier, herein be, and the same is, hereby denied and dismissed.

So ORDERED, this 25th day of May, 1979.

/s/ TULANE E. POSEY, JR.
Tulane E. Posey, Jr.
Administrative Judge

MISSISSIPPI WORKMEN'S COMPENSATION COMMISSION

MWCC No. 77 09779-B-6996

DONALD M. SEGER, Claimant

VS.

TENNESSEE RIVER PULP & PAPER COMPANY, Employer

and

THE TRAVELERS INSURANCE COMPANY, Carrier

Appearing for Claimant:

Honorable Jan R. Butler, Attorney at Law, of the Firm of Butler and Butler, Eupora, Mississippi

Appearing for Defendants:

Honorable Reed Millen, Attorney at Law, of the Firm of Lumpkin, Holland, Ray & Upchurch, Tupelo, Mississippi

Honorable Fred B. Smith, Attorney at Law, Ripley, Mississippi

FULL COMMISSION ORDER

The above styled cause was heard on review by the Full Commission on September 24, 1975, in the offices of the Mississippi Workmen's Compensation Commission in Jackson, Mississippi, on the *CLAIMANT'S PETITION FOR REVIEW OF DECISION RENDERED BY ADMINISTRATIVE JUDGE.*

Having considered the oral and written arguments offered on behalf of the parties, and having thoroughly studied the record and applicable law, it is the opinion of the Full Commission that the *ORDER OF ADMINISTRATIVE JUDGE* dated May 23, 1979, contains error; there-

fore, the Full Commission reverses the Order as to the liability of the defendant, Tennessee River Pulp & Paper Company, and awards compensation to the claimant upon a finding that Charles Smith is not an independent contractor of Tennessee River Pulp & Paper Company, and that the claimant is an employee of Tennessee River Pulp & Paper Company.

The primary issue before the Commission is whether Charles Smith, and his workman, Donald M. Seger, stood in the relationship of independent contractor with Tennessee River Pulp & Paper Company, or whether, for purposes of workmen's compensation, these workers were employees of Tennessee River Pulp & Paper Company. The Administrative Judge denied benefits to the claimant on the grounds that Charles Smith, the claimant's proported immediate employer, was not the employee of Tennessee River Pulp & Paper Company, but rather acted as an independent contractor in performing services for this alleged employer.

Tennessee River Pulp & Paper Company owns and operates a large lumber mill at Ackerman, Mississippi. It also owns and controls considerable timber acreage. In order to obtain the raw materials necessary for its operation, Tennessee River Pulp & Paper Company regularly enters into agreements with loggers in the area to cut and haul logs to its mill. Charles Smith had been engaged in this work for Tennessee River Pulp & Paper Company for several years prior to September 3, 1976, in fact, from October, 1975 through September, 1977, Mr. Smith signed thirty-three "cut and haul" contracts with Tennessee River Pulp & Paper Company. As one contract would expire, Mr. Smith would enter into another, and, occasionally, he would work two or three contracts with Tennessee River Pulp & Paper Company at one time.

Mr. Smith hired the claimant to work as a timber cutter approximately three weeks prior to the claimant's injury. On September 3, 1976, while Mr. Seger was engaged in

cutting timber in Charles Smith's work crew, he was injured in a logging accident. He was, at the time, cutting timber from Tennessee River Pulp & Paper Company land to be delivered to its millyard when a pine tree fell across claimant's back. Another member of the work crew cut the tree away, and claimant was transported by ambulance to Webster General Hospital in Eupora, Mississippi.

Later Mr. Seger was transferred to the University Hospital in Jackson, the Veterans Administration Hospital in Jackson, and finally to the Veterans Administration Hospital in Memphis, Tennessee. As a direct result of this accident, Mr. Seger, a forty-five year old male with an eighth grade education, is a paraplegic. He has been permanently and totally disabled since the date of his injury and will continue to be in need of nursing services, medical attention, and special supplies and equipment.

To be entitled to compensation, the claimant has the burden of proving that at the time of his injury he was an employee of the Tennessee River Pulp & Paper Company. In order to meet this burden, the claimant must prove that Charles Smith was acting as an employee of Tennessee River Pulp & Paper Company and not an independent contractor. A determination of Mr. Smiths' status as an employee or an independent contractor cannot be made from examining solely the immediate circumstances surrounding the cutting on the defendant's land on September 3, 1976. Neither can this status be determined exclusively by the contract which existed between Mr. Smith and Tennessee River Pulp & Paper Company. The courts have not formulated a hard and fast definition for the determination of whether any given relationship is one of independent contractor or of employer-employee. They have, however, set forth indicia of such relationship to be used as guides in making such a determination. Whether some or all of them exist in any given situation is not absolutely controlling in the determination of the relationship. Rather, considera-

tion must be given to the entire pattern of Mr. Smith's relationship to Tennessee River Pulp & Paper Company. *Brown v. L. A. Penn and Son,* 227 So.2d 470 (Miss. 1969) hereinafter cited as *Brown v. Penn.*

The statutory definitions of an employee and of an independent contractor are set out in Section 73-3-3 Mississippi Code Annotated:

> (d) "Employee" means any person, including a minor whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, written or oral, express or implied, provided that there shall be excluded therefrom all independent contractors. . . .
>
> (s) "Independent contractor" means any individual, firm, or corporation who contracts to do a piece of work according to his own methods without being subject to the control of his employer except as to the results of the work, and who has the right to employ and direct the outcome of the workmen independent of the employer and free from any superior authority in the employer to say how the specified work shall be done or what the laborers shall do as the work progresses; one who undertakes to produce a given result without being in any way controlled as to the methods by which he attains the result."

There are two tests utilized in analyzing the employee/independent contractor question: (1) the control test; and (2) the relative nature of the work test. Our court in *Cook v. Neely Lumber Company,* 275 So.2d 389 (Miss 1973), has commented on these tests.

> ". . . In general, it is said that the right of control, not the actual control of, the details of the work is the primary test of whether a person is an independent contractor of an employee. . . . It is the ultimate right of control, not the overt exercise of that right, which

> is decisive. Probably the four principal factors under the control test, are (1) direct evidence of right or exercise of control; (2) method of payment; (3) the furnishing of equipment; and (4) the right to fire."

And to the latter test:

> . . . (2) the relative nature of the work test. The latter contains these ingredients: "the character of the claimant's work or business—how skilled it is, how much of a separate calling or expertise it is, to what extent it may be expected to carry its own accident burden and so on—and its relation to the employer's business, that is, how much it is a part of the employer's regular work, whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job." . . .

The application of these tests must be made as hereinafter indicated:

> "at last, and in any given case, it gets back to the original question of whether the particular contractor is in fact independent in the relation of the service in which he is engaged to perform. The various test enumerated in the decisions are simply methods to be used as an aid in determining whether there is true independence in right and in fact. (Dunn, *Mississippi Workmen's Compensation,* Second Edition, Section 131, page 169 (1967)."

Although Mr. Smith stated that Tennessee River Pulp & Paper Company had no direct control over his day-to-day operations, it is not the actual interference of exercise of control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor. In offering evidence of Tennessee River Pulp & Paper Company's di-

rect control over Mr. Smith operations, the claimant testified that Tennessee River Pulp & Paper Company's agents had come to the work site on three different occasions to inspect the premises. He stated that these agents had told him to stay off the small timber, to cut all the trees low enough so that a tractor could go over them, to be sure the timber was large enough, and to not cross over certain lines.

Three of Tennessee River Pulp & Paper Company's employees testified that they inspected and supervised Mr. Smith's work. Mr. Lamar Jarvis, Tennessee River Pulp & Paper Company's procurement officer testified:

> "The only time I was on this job where Seger was hurt was to perform a stumpage sale inspection to see exactly how the job was being handled, if it was in accordance with our cut and haul contracts. (we would walk the cutting area to see if any timber was laying on the ground that they had already worked over; and then we would inform him (Smith) if there was any timber on the ground that should be hauled . . .) (Page numbers 177 and 178)

Donald Neal, Tennessee River Pulp & Paper Company's timberland field assistant, testified:

> Q. And all ya'll would supervise and inspect the work during its progress.
>
> A. Right, to see if it meet up with the contract.

Tony Beacon, also a procurement officer, testified that the instructions that he would give to Smith or members of Smith's crew would be in the contract, which calls for all merchantable pins or all merchantable hardwood to be cut.

Mr. Smith testified that he had worked as an independent contractor cutting and hauling timber for approximately ten years, and in addition, he farms his own land. In his

dealings with Tennessee River Pulp & Paper Company, he would cut logs from designated tracts of timber on Tennessee River Pulp & Paper Company's land. According to the contract, title to the timber remained in Tennessee River Pulp & Paper Company until severance, at which time Mr. Smith would sell the pine timber back to Tennessee River Pulp & Paper Company for use in its lumber operations. The hardwood would be sold at Mr. Smiths' discretion, with Tennessee River Pulp & Paper Company receiving $20.00 per thousand feet for the hardwood which Mr. Smith cut and removed from the land. Mr. Smith was paid by the load for the pine timber he delivered to Tennessee River Pulp & Paper Company. Mr. Smith further testified that under the contract he had with Tennessee River Pulp & Paper Company, Tennessee River Pulp & Paper Company had the right to inspect to see if the timber was being cut according to contractual specifications. He also stated that he paid the claimant's social security tax and withheld income tax from the claimant's pay.

Tennessee River Pulp & Paper Company relies on evidence that its employees had not exercised actual control of Mr. Smith's crew during the logging operation. However, the true criterion is not whether Tennessee River Pulp & Paper Company did in fact exercise supervision, but rather whether it had the right to do so. The fact that an employee may be allowed to use his own judgment and skill in the manner of performing his work does not of itself make him an independent contractor. The important factor is that the employee was at all times subject to Tennessee River Pulp & Paper Company's direction and control, whether exercised or not.

The short term contract which Mr. Smith entered into also reveals that he was under the direction of Tennessee River Pulp & Paper. According to the contracts, he was to trim all limbs and knots smooth with the surface of the log. His truck had to be loaded in solid lots of pine and hard-

wood, and or either short wood or logs. He could not mix loads, by either specimens or length. All trees had to be cut as close to the ground as reasonable practical. Smith was required to remove all logging debris, tops, limbs, and other debris from the roads, ditches and fire breaks on the land. He could not terminate logging operations in the natural logging area until he had logged all merchantable timber. Title to the pulpwood and trees from which the pulpwood was produced, was in and remained in Tennessee River Pulp & Paper Company. His use of the land was nonexclusive. Tennessee River Pulp & Paper Company could contract with others on the same tract or carry out any activity which it deemed necessary or desirable. All bulldozer work was done, when needed, by Tennessee River Pulp & Paper Company. Tennessee River Pulp & Paper Company directed the time in which Mr. Smith and his crew could haul and deliver. No deliveries could be made on holidays, plant vacations, or when Tennessee River Pulp & Paper Company was over-supplied with wood. Although no deliveries were made to the mill at Counce, Tennessee, all cutting and hauling of timber would be suspended should the operation of Tennessee River Pulp & Paper Company's mill at Counce, Tennessee, be suspended by reason of any event of force majure.

The second element of the control test concerns the manner of payment to the employee. Tennessee River Pulp & Paper Company argues that since Mr. Smith was paid by the job and that no employee-type withholding was taken out of his check indicates lack of control of Mr. Smith. Again, this element of itself is not determinative of the relationship. *Sones v. Southern Lumber Company,* 215 Miss. 148, 60 So.2d 582 (1952).

Professor Larson, in his work, *Workmen's Compensation Law,* Section 44.33 states:

> ". . . each thousand feet of lumber hauled is a completed project, but is not the essential character of the

> service when it is understood that the work is to be continuous for an indefinite period. The majority of modern decisions awarding compensation give little weight to the fact that a trucker, cutter, or loader is compensated at so much per thousand feet of logs or timber. . ."

Although Mr. Smith was paid by the job, his contract with Tennessee River Pulp & Paper Company specified that payment could be made weekly for all timber delivered during the preceding week. The epidence also reveals that Tennessee River Pulp & Paper Company, at Mr. Smith's request, deducted an amount from each payment made. This amount was applied to Mr. Smith's personal bank note which financed his equipment.

Tennessee River Pulp & Paper Company further relies on the fact that Mr. Smith furnished his own equipment and worked essentially at hours determined by him. Again, this element is not determinative of the issue. Even if Mr. Smith did have a business of his own in which he utilized his own equipment, he had entered into a continuing relationship with Tennessee River Pulp & Paper Company that amounted to employment. *Empire Home Builders v. Guthrie,* 187 So.2d 17 (Miss. 1966).

The final element under the control test involves Tennessee River Pulp & Paper Company's right to terminate the agreement. Tennessee River Pulp & Paper Company contends that the contracts which were entered into were by the mutual consent of the parties, and, as such, could not be terminated without default. The agreements consisted of numerous short-term contracts, renewed regularly. Had Tennessee River Pulp & Paper Company determined to end Mr. Smith's employment, it could have simply refused to enter into any further contracts. Therefore, Tennessee River Pulp & Paper Company had the right, at short periods, to terminate its long recurring relationship with Mr. Smith. As was stated by the Mississippi Supreme Court

in *Boyd v. Crosby Lumber & Mfg. Co.*, 250 Miss. 433, 166 So.2d 106 (1964), (hereinafter cited as *Boyd v. Crosby*):

> ". . . . the key fact is that control of Durman was perpetrated by the devices of short term, written contracts, renewed regularly, and Durman's working exclusively for Crosby for a number of years. He was dependent upon these additional, short-term contracts. Factors that the services are recurring and continuous and that the alleged contractor is not engaged in fact in an independent business of this own, are important under the common-law, control test, as well as under the relative nature of the work rule. (166 So.2d. 106 at 111 (Miss. 1964).

In addition to the control test, our court has recognized the relative nature of the work test as being equally valid and pertinent. *Brown v. Penn, Boyd v. Crosby.* The factors comprising the relative nature of the work test:

> 1. the amount of skill required to carry out Mr. Smith's work; 2. whether Mr. Smith's work is an integral part of the defendant's business; 3. whether the work is continuous or intermitent; and 4. to what extent the defendant could expect Mr. Smith to carry his own accident burden.

In determining the relationship between the parties, Professor Larson, in *Workmen's Compensation Law,* Section 45.00 (Second Edition, 1967), offers the following:

> "The modern tendency is to find employment when the work being done is an intergral part of the regular business of the employer, and when the worker, relative to the employer, does not furnish an independent business or professional service."

Professor Larson continues:

> ". . . there has been an increasing effort on the part of the employers to avoid the financial cost and the

bookkeeping and reporting inconvenience that goes with Workmen's compensation, unemployment compensation, social security, and the like. This effort usually takes the form of subcontracting portions of the employer's production and distribution process, particularly in the peripheral areas of obtaining raw materials, . . ."

With reference to the relationship between the claimant and the defendant, the Honorable Vardaman S. Dunn stated, in *Mississippi Workmen's Compensation,* Section 134, (Second Edition, 1967):

"Logging operations furnish a continuous service which is an intergral part of the business of the mill. Under this view, the common law "control" test is retained, but the existence of the control element is more readily found by reference to slight circumstances from which the existence of the right of control must be inferred, such as (1) continuity of service for the same employer over an extended period, and (2) an understanding that the arrangement or contract is terminable by either party at will with no reciprocal obligation between the parties. And the existence of a written contract which describes the logger as an independent contractor is not of controlling significance when related to a continuity of service under a series of such contracts."

It is significant that Mr. Smith did not furnish an independent business. He entered into short-term contracts. When these contracts expired others were made. Sometimes two and three contracts would be in existence at the same time. Mr. Smith had been engaged in this type of work exclusively for Tennessee River Pulp & Paper Company for a year before the accident and at the time of the hearing in this matter was still so engaged. He did not hold himself out to the public as performing an independent business

service, but regularly devoted all or most of his time to the particular employer. It was a continuing relationship with the defendant, which in substance amounted to employment. The arrangement with Mr. Smith was solely for the purpose of augmenting the defendant's business.

Tennessee River Pulp & Paper Company surrendered none of its control to Mr. Smith. Each load delivered by Mr. Smith was made as part of the necessary operation of the timber business of the defendant. Tennessee River Pulp & Paper Company places a large percentage of its necessary operations beyond the Workmen's Compensation Act to operate without regard to these workmen. If the real relationship between Mr. Smith and the defendant could be changed by a contract device, employers could write themselves out from under nearly every Workmen's Compensation Law or unemployment compensation statute in existence today. *Boyd v. Crosby.*

At this point, it is instructive to note the language of *Robinson v. Younse Lumber Co.*, 8 L. A. App. 160 (1927), as cited in *Brown v. E. L. Bruce Co.*, 175 So.2d 151 (Miss. 1965):

> "If those engaged in the saw mill business, which includes logging, were permitted to put an impecunious man in charge of the logging cutters and base his compensation upon the amount of logs cut instead of paying him a salary and when sued for compensation plea that the man in charge was an independent contractor, the laborers in the woods would be entirely cut off and the purpose of the law would be thwarted. If courts should permit those engaged in industrial enterprises to escape liability in this way, the door would be left wide open to all kinds of subterfuge to escape liability and the Act would be dead letter in our books."

Accordingly, for the reasons previously set forth, the Full Commission reverses the *ORDER OF ADMINIS-*

TRATIVE JUDGE dated May 23, 1979, and awards compensation benefits to the claimant in this cause. In awarding benefits, the Full Commission notes that loss of the use of both legs constitutes permanent total disability. Section 71-3-17(a) Mississippi Code 1972 Annotated.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the defendants, Tennessee River Pulp & Paper Company, employer, and the Travelers Insurance Company, carrier, pay unto the claimant compensation benefits as follows:

1. Permanent total disability benefits at the rate of $84.00 a week beginning September 3, 1976, and continuing thereafter for a period not to exceed 450 weeks, with proper credit for any such payment heretofore paid unto the claimant.

It is further ordered that the defendants pay for, furnish and provide to the claimant such reasonable and necessary medical services and supplies as the nature of the claimant's injury or the process of his recovery may require, as provided for by Section 71-3-15 Mississippi Code 1972 Annotated, including but not limited to medical, surgical and other attendants or treatments, nursing and hospital services, medicine, crutches, artificial members and other apparatus, and specially adapted housing for paraplegics, and transportation costs.

SO ORDERED this the 15th day of October, 1979.

/s/ J. T. CROHLIN, Chairman

/s/ J. T. HILL, Commissioner

/s/ WALTER M. O'DARR, Commissioner

ATTEST:

/s/ MILDRED MORRISON
(Mrs.) Mildred Morrison, Secretary

ORDER AND OPINION OF CIRCUIT COURT

IN THE CIRCUIT COURT OF WEBSTER COUNTY, STATE OF MISSISSIPPI

Claimant No. 2696

DONALD M. SEGER, *Claimant*

versus

TENNESSEE RIVER PULP & PAPER CO., *Employer*

and

TRAVELERS INSURANCE CO., *Carrier*

Order

This day this cause came on to be heard on appeal by the Employer and Carrier from the Order of the Mississippi Workmen's Compensation Commission awarding Claimant benefits and all parties being present through their respective counsel and the Court having reviewed the record and having heard the argument of counsel, the Court finds that it has jurisdiction of the subject matter and the parties and it is of the opinion that the Order of the Mississippi Workmen's Compensation Commission is supported by substantial evidence.

IT IS THEREFORE ORDERED AND ADJUDGED that the Commission's Order is hereby affirmed.

FURTHER, this Court approves the contract between Claimant and his counsel allowing attorney's fee of thirty-three and one third per cent (33 1/3%).

ORDERED AND ADJUDGED, this 20th day of December, A. D., 1979.

/s/ NILES MCNEEL
Niles McNeel
Circuit Judge

Dated: 20th day of Dec., 1979
Mrs. June L. Castle, LP/DC

IN THE CIRCUIT COURT OF WEBSTER COUNTY,
STATE OF MISSISSIPPI

No. 2696

In Vacation, 1979

DONALD SEGER, *Plaintiff-Claimant*

vs.

TENNESSEE RIVER PULP & PAPER COMPANY and
THE TRAVELERS INSURANCE COMPANY, *Defendants*

Opinion of the Court

This is an appeal from the Workmen's Compensation Commission in which the Full Commission reversed the Administrative Judge, whereby the Judge had denied workman's compensation benefits to the Claimant on the basis that the Claimant—his immediate employer, Charles Smith, was an independent contractor and not an employee of Tennessee River Pulp and Paper Company.

The Workmen's Compensation Commission in reversing the Administrative Judge found from the evidence that the Claimant and Mr. Smith were in fact employees of Tennessee River Pulp and Paper Company and were not independent contractors.

The sole question for this Court to consider is whether or not the Claimant and Charles Smith were independent contractors or were employees of Tennessee River.

The Court has had cited to it a number of cases that were considered by the Full Commission and one or two other cases that the Commission may have considered but did not cite. The Court has also listened to argument from both sides. It is generally agreed, and the Court concurs, that the controlling case in this area is *Boyd vs. Crosby Lumber and Manufacturing Company, 166 So. 2nd 106,* a

1964 case. In that case the Supreme Court has outlined the test or criteria to be used in determining whether or not an individual is in fact an independent contractor or an employee. This case has been cited many times since this opinion in 1964, but the criteria has not changed. Basically, the Supreme Court has stated that in determining the question of whether an independent contractor status exists, the Court should consider not just the contract between the parties, or not just one factor, but should consider all factors to determine whether or not the alleged employer has control over the individual who claims to be an independent contractor and, also, they cite the relative nature of the work test.

In the instant case Claimant was injured when a tree fell on him, thereby causing him to be paralyzed from the waist down. At the time he was working for Charles Smith, who, the testimony reveals, has had some thirty-three contracts with Tennessee River over a two- or three-year period. The testimony also reveals that Mr. Smith had apparently had contracts with other logging operators in addition to Tennessee River. The testimony further reveals that Mr. Smith picked up Mr. Seger, would take him to work each day, would take him home, would bring his lunch to him. There is testimony that Smith had the right to hire and fire his employees, including Seger.

In the Crosby case many of the same conditions existed, including the right to hire and fire, including numerous contracts held by Crosby with Boyd's employer.

The Court has been asked to distinguish Boyd vs. Crosby from the instant case due to the fact that it is argued that the Boyd vs. Crosby decision mentions the fact that Durham, who was alleged to be the independent contractor in that case, had continuous and uninterrupted contracts with Crosby Lumber Company, whereas in the instant situation there are contracts with other logging concerns, other than Tennessee River.

In Boyd vs. Crosby, the Supreme Court has said: "It is also significance that Durham did not furnish an independent business. He entered into short term written contracts, for one, two or three months. When these contracts expired, others were made, sometimes covering the same tract, as in the instant case. Durham had been engaged in this type of work exclusively for Crosby for five to six years. The Commission concluded that this worker did not hold himself out to the public as performing an independent business service, but regularly devoted all or most of his time to the particular employer. It was a continuing relationship with Crosby, which insubstance amounted to employment, regardless of other factors. The work was regular, recurring, substantial, and exclusive, and was such a relatively large item to Durham that his relationship to Crosby could not be that of an independent businessman."

The Court finds that although there is a difference in this between Boyd vs. Crosby in that there were apparently other contracts that were entered into between Charles Smith and other logging operations, that this case is still controlled by Boyd vs. Crosby in that the work that Charles Smith was doing for Tennessee River constituted such a regular, recurring, substantial and exclusively large item to Charles Smith that his relationship to Tennessee River could not be that of an independent businessman.

The question on an appeal situation on a question of fact is limited to the substantial evidence rule which holds that if there is substantial evidence to support the Commission's findings, that the Court must affirm the Commission's holding.

The Court finds there was such substantial evidence to support that finding and the Order of the Commission is affirmed.

(December 20, 1979)

Dated: 4th day of Jan., 1980
Mrs. June L. Castle, LP/DC

OPINION OF MISSISSIPPI SUPREME COURT

IN THE SUPREME COURT
OF MISSISSIPPI

No. 52,157

TENNESSEE RIVER PULP AND PAPER COMPANY &
TRAVELERS INSURANCE COMPANY

v.

DONALD M. SEGER

This Opinion Not Designated For Publication

Court From Which Appealed:
Circuit Court, Webster County

Presiding Judge:
Circuit Judge Niles McNeel

Attorneys for Appellant:
Smith, Elliott & Fortier
Lumpkin, Holland, Ray & Upchurch

Attorneys for Appellee:
Butler and Butler

Nature of the Case:
Workmen's Compensation

Disposition:
Affirmed and Remanded to the Workmen's Compensation Commission

Before WALKER, BROOM and BOWLING

BOWLING, Justice, for the Court:

We have studied very carefully over a period of time the record and briefs in this case, together with a full consideration of the oral arguments. A careful analysis has been

made of the lengthy unanimous opinion of the Workmen's Compensation Commission and the written opinion of the circuit judge affirming the Commission's opinion. These opinions include a full and complete discussion of the issues and authorities in the cause and we conclude that the full Commission and the circuit judge had ample authority under the law and the facts to render their opinions. We cannot reach a conclusion that their opinions and judgments were manifestly wrong. Therefore, we adopt those opinions as the opinion of this Court and thereby affirm the cause and remand it to the Mississippi Workmen's Compensation Commission for proceedings consistent with its opinion as affirmed by the circuit court.

AFFIRMED AND REMANDED TO THE WORKMEN'S COMPENSATION COMMISSION.

PATTERSON, C.J., SMITH, P.J., ROBERTSON, P.J., SUGG, WALKER, BROOM, LEE and COFER, JJ., Concur.

CONTRACTS BETWEEN PETITIONER, TENNESSEE RIVER PULP & PAPER COMPANY AND SMITH

TENNESSEE RIVER PULP & PAPER COMPANY

Form No. —— (Revised 4/24/68)

AGREEMENT TO CUT AND DELIVER PULPWOOD

(In Evidence: Exh #1 For CI; Witness: ————)
(For Iden.: Exh #D; Witness: D. Smith)

Contract No. CFL 989R

State of Mississippi
County of Webster

This agreement, made and entered into this 30 day of July, 1976, between TENNESSEE RIVER PULP & PAPER COMPANY, of Counce, Tennessee, hereinafter referred to as "TENNESSEE RIVER", and CHARLES SMITH, of Mississippi, hereinafter referred to as "CONTRACTOR".

WITNESSETH:

WHEREAS, Tennessee River is the owner of certain timber rights in the hereinafter described cutting area and desires to have certain timber cut and removed therefrom;

AND WHEREAS, Contractor desires to contract with Tennessee River to fell the said timber, saw the same into pulpwood bolts of proper lengths and specifications and deliver them as hereinafter provided;

NOW, THEREFORE, for the consideration and upon and subject to the terms and conditions hereinafter set forth, the parties hereto have agreed as follows, to wit:

1. During the period beginning on the 30 day of July, 1976, and ending on the 31 day of October, 1976, subject to the further provisions of this agreement, Contractor shall fell, cut, haul and deliver to Tennessee River at Ackerman, approximately 150 cords of pulpwood timber weekly. Such pulpwood timber shall be pine or hardwood,

or both, cut and processed from trees in Webster County (Counties), Miss., on lands owned by Tennessee River or on which it has cutting rights, said lands being more particularly described as follows: See Plat E ½, SW ½ TISS RZE, Sec. 10, 5 mi. N. of Cumberland. Trees to be felled, cut, hauled and delivered from the lands described above shall be designated as follows: All Merchantable Pine Timber. The trees so designated shall constitute the entire amount of timber covered by this agreement.

2. Contractor shall supply and deliver pulpwood to Tennessee River, and shall be solely responsible for the manner, means and methods, by which such pulpwood shall be felled, cut, hauled, supplied and delivered, Tennessee River being interested only in the end results to be accomplished according to the terms of this agreement. These end results are hereby defined and made a part of this agreement as follows: The pulpwood to be delivered by Contractor to Tennessee River shall meet the following specifications, namely: *Diameter:* The size of all pine pulpwood shall be from ———————— diameter inside bark to ———————— ————d.i.b.; the size of all hardwood pulpwood shall be from ————————d.i.b. to ———————— d.i.b. *Length:* The pulpwood shall be designated by length as either shortwood or logs; the length of shortwood shall be from ———————— to ————————; the length of logs shall be from tree length. *Soundness: the* pulpwood shall be cut from live, sound trees; clean hollows up to fifty per cent of the log diameter will be acceptable; no logs smaller than ten inches in diameter containing rot will be accepted; a four inch diameter rot will be allowed in logs ten inches and larger in diameter. *Straightness:* The pulpwood shall be reasonably straight; no elbows will be permitted. *Trimming:* Limbs and knots shall be trimmed smooth with the surface of the log. *Quality:* No pulpwood with burn or char, metal of any description, or two callaces will be accepted. *Species:* All species of Southern pine will be accepted; acceptable hardwood species are ash, beech, birch, cottonwood, elm, gum, hackberry, maple, poplar, sycamore

and all species of oak except blackjack. *Loading:* All trucks shall be loaded in solid lots of either pine or hardwood, and of either shortwood or logs; and no mixed loads of pulpwood, by either species or length, shall be delivered to Tennessee River by Contractor.

3. In the performance of this agreement, Contractor shall maintain the following standards:

(a) All trees shall be cut as close to the ground as is reasonably practical considering the timber, terrain and weather conditions.

(b) Care shall be exercised so as to avoid undue injury or damage to all uncut timber, whether merchantable or otherwise.

(c) Both Tennessee River and Contractor recognize the dangers and hazards of forest fires, and the damages that result therefrom, and the advantages to each of them, and also to the public in general, in preventing and suppressing such fires. Tennessee River, under its general program and practices, strives to lessen the dangers from forest fires, and Contractor agrees that he shall exercise constant and vigorous effort to prevent and suppress forest fires on said lands, and shall require his employees, subcontractors, and employees of said subcontractors to do likewise. Contractor shall also require his employees, subcontractors and employees of subcontractors to give every possible aid in suppressing forest fires on said lands, or on any other lands, regardless of by whom owned, in the general vicinity of his timber operations hereunder, all of which shall be done at Contractor's own expense. During any such period in which, because of the condition of the woods, there may be an extreme hazard of fire, Contractor, in his operations, shall, for himself and his employees, or subcontractors or their employees, enforce any rules in that regard made by Tennessee River for its employees, licensees, etc., to prohibit

smoking or building fires for any purpose, except at such places as may be mutually agreed upon between Contractor and Tennessee River.

(d) All butts, laps, tops, limbs or other logging debris resulting from Contractor's operation shall be removed from the roads, ditches and firebreaks on the lands.

(e) No gates shall be left open, and any damage caused by contractor's operations hereunder to fences, roads, power lines, buildings or other improvements on the above described lands or on adjacent lands shall be replaced or paid for by Contractor at replacement cost.

(f) Contractor shall log all merchantable timber in a natural logging area before terminating logging operations in such locality, unless adverse weather conditions dictate otherwise.

(g) Contractor's operations in cutting the trees and in processing the pulpwood therefrom shall be conducted in a proper and workmanlike manner, and he shall make a diligent effort to obtain the maximum pulpwood from each tree.

4. Contractor may use, without any charge therefor, any unmerchantable hardwood trees for constructing such roads, yards, bridges, skidways or loading ramps as may be necessary to his operations hereunder.

5. Tennessee River hereby expressly grants Contractor ingress to and egress from any lands owned by it or upon which it has cutting rights from which Contractor has been directed to cut and process pulpwood, and the use of the private roads thereon for the purpose of cutting, processing and delivering such pulpwood. Contractor shall use reasonable care and diligence in carrying out the terms of this agreement on such lands.

6. Tennessee River shall pay Contractor for the cutting, processing and delivery of pulpwood hereunder the sum of $7.10 per cord for pine logs, $——— per cord for pine shortwood, $——— per cord for hardwood logs and $——— per cord for hardwood shortwood cut from the above described lands. The word "cord" as used in this agreement, shall mean 128 cubic feet of volumetric measure or its weight equivalent. The method of scaling to be employed, whether weight or volume, shall be dependent upon the facilities available and shall be a matter within the sound discretion of Tennessee River. Payment shall be made weekly for all timber delivered during the preceding week.

7. Force Majeure. Should any event of force majeure, including without limitation the flooding of said lands or the disabling or destruction of Contractor's logging equipment by fire, flood or other act of God, render it impossible for Contractor to perform work hereunder, or should the operation of Tennessee River's pulp and paper mill at Counce, Tennessee, be suspended by reason of any event of force majeure, including without limitation fire, explosion or strike of workmen, all cutting and hauling of timber hereunder shall be suspended so long as such conditions resulting from force majeure shall continue in effect, and the termintion date of this agreement shall be extended by the number of days for which such suspension of cutting or hauling continues, but in no event for more than ninety (90) days beyond the termination date hereinbefore specified. The party affected by such event of force majeure shall give the other party prompt written notice of the cause and commencement thereof and also when it ceases to have effect.

8. Any trees left uncut which contain merchantable material, or which in whole or in part are damaged or destroyed through the negligence of Contractor, his employees or subcontractors, or employees of subcontractors, or are damaged or destroyed by fires as a result of such negligence, shall be paid for by Contractor at the rate of

$20 per cord for pine and $20 per cord for hardwood, which sums are agreed upon between the parties hereto as liquidated damages and not by way of penalty.

9. Contractor's use of the above described lands for the purposes of this agreement shall be deemed to be non-exclusive; and all of Contractor's rights and privileges shall be exercised with due regard for, and so as to avoid unnecessary interference with, any use of the lands by third parties, required or permitted by any agreement with Tennessee River heretofore or hereafter made, provided that such use by third parties shall not unreasonably interfere with Contractor. Neither will Contractor unreasonably interfere with, hinder or prevent Tennessee River from conducting on said lands from time to time such activities as it may consider to be necessary or desirable in the protection, management and improvement of said lands and the timberland and in the utilization or disposition of other merchantable timber.

10(a). Neither party hereto shall have the right to cancel or terminate this agreement, prior to the date of termination heretofore fixed herein, except for a default on the part of the other party in carrying out the terms hereof in the performance of his or its agreements and obligations hereunder. However, in the event of a default on the part of the Contractor, that is, Contractor's failure to comply with any term or condition of this agreement, and if such default by him shall not have been remedied within fifteen (15) days after written notice thereof given to him by Tennessee River, then Tennessee River shall have the option, at its own and sole election, of immediately canceling and terminating this agreement, in which event written notice of such cancellation and termination shall be given to Contractor by Tennessee River. By the same token, in the event Tennessee River shall default in complying with the terms and conditions of this agreement, and its default shall not have been remedied within fifteen (15) days after written notice thereof given by Contractor, or if Tennessee

River shall fail to make any payment due Contractor hereunder within fifteen (15) days after same has become due, Contractor shall have the option, at his own and sole election, of canceling and terminating this agreement by giving written notice to Tennessee River of his action in so doing.

10(b). If Contractor, at any time during the life of this contract, shall make a general assignment for the benefit of his creditors, or if a receiver shall be appointed for any property of Contractor, or if a petition shall be filed by or against Contractor in any proceedings under any bankruptcy or insolvency laws, the happening of any of these events shall be considered as a default on the part of Contractor, and then and thereupon, Tennessee River, may, at its option, if it elects so to do, immediately cancel and terminate this agreement, and in addition to any other remedies it may have, at law or in equity, withhold any further payments hereunder.

11. Waiving of breaches of any one or more of the agreements contained herein by either of the parties hereto shall be limited to the particular instance and shall not be deemed to be a waiver of any other breaches of agreements at other times, and the termination rights given herein shall not be deemed to be the exclusive remedy of the terminating party but shall be in addition to all other remedies in law or equity which such party may have against the other in connection with this agreement and the breach hereof.

12. Contractor shall employ and pay his own servants, agents and employees used by him in the performance of this agreement, shall be responsible for all of their acts, and shall furnish all servants, agents and employees, and all materials, merchandise, tools, equipment and machinery necessary to cut, process and deliver the pulpwood called for by this agreement. The parties understand that Contractor is an independent contractor, that nothing contained herein shall be construed to make Contractor an

agent or employee of Tennessee River, to authorize Contractor to obligate Tennessee River or to constitute Contractor and Tennessee River joint venturers.

13. Tennessee River hereby covenants and warrants that it owns, or has exclusive cutting rights to, the timber covered by this agreement and also has the right to enter the premises described above and to cut and remove said timber therefrom.

14. Title to the pulpwood and the trees from which the pulpwood is produced, where cut from lands owned by Tennessee River or on which it has cutting rights, shall be and remain in Tennessee River. Contractor shall not permit any liens to be filed against any of the pulpwood produced under this agreement and shall save Tennessee River harmless from any claims in connection therewith.

15. During the term of this agreement, Contractor shall observe all rules, regulations, ordinances and laws relating to all work performed hereunder, including without limitation the Fair Labor Standards Act of 1933, as amended, and any wage and hour, Social Security, unemployment insurance or workmen's compensation law as now or hereafter in force which may be applicable. Contractor agrees to furnish Tennessee River with certificates of compliance with all such rules, regulations, ordinances and laws in such form or forms as Tennessee River may, from time to time, request; Tennessee River shall not be obligated to receive, accept or pay for any delivery of pulpwood for which such a certificate is not furnished upon request. In addition, Contractor shall secure all licenses, pay all taxes, maintain all records and make all reports and returns as may be required by the laws of the United States and of those states in which work is performed hereunder.

16. Contractor agrees that Tennessee River has not made and does not make any representations as to the present or future condition of the lands from which trees are to be cut and processed, the condition of the roads on said lands or the conditions of any improvements thereon.

Contractor further agrees, as a condition of this agreement without which this agreement would not be made, to hold Tennessee River harmless against any claim, loss or expense, including attorney's fees, on account of or resulting from any injury or damage sustained by Contractor, his agents, employees or subcontractors by reason of the condition of said land, or any injury or damage to persons or property of others, including without limitation agents, employees and subcontractors of Contractor, resulting from acts or omissions of Contractor in the performance of any work, under color of this agreement. Contractor shall, during the period of this agreement, carry workmen's compensation and public liability insurance in such amounts as Tennessee River may reasonably request, and shall, on demand, furnish Tennessee River with satisfactory evidence of such insurance coverage, but such insurance shall not be deemed to limit or to be a substitute for Contractor's obligation to indemnify Tennessee River as above set forth.

17. On the termination of this contract, Contractor shall have and is hereby given full rights and authority to remove any and all buildings, machinery and other equipment and all improvements erected, constructed, built and owned by Contractor that can be separated from the land; and any of such which are not so removed within sixty (60) days following the termination date of this contract or any extension hereof shall become the property of Tennessee River.

18. All notices deliverable under the terms of this agreement shall be sent by registered or certified mail. Any notice to Tennessee River shall be addressed to Tennessee River Pulp & Paper Company, P.O. Box 33, Counce, Tennessee 38326. Any notice to Contractor shall be addressed to Charles Smith, Eupora, Mississippi, unless, however, Contractor shall have previously designated in writing to Tennessee River another address for the receipt of notice.

19. This agreement shall be binding upon and inure to benefit of Tennessee River's successors and assigns and

shall be binding on the heirs, successors, representatives and assigns of Contractor, but shall not be assignable or transferable by Contractor without Tennessee River's written consent first had and obtained. By the same token, Contractor may not subcontract any of the work to be done hereunder without the written consent of Tennessee River first had and obtained.

20. This writing constitutes the entire agreement between the parties with respect to the pulpwood Contractor is to cut, process and deliver to Tennessee River hereunder. The parties are in agreement that no understanding or agreement, verbal or otherwise, in relation hereto exists between them except as set forth herein that and this agreement may not be altered, modified or amended except by an agreement in writing stated by the parties hereto.

21. Time is of the essence in this agreement.

22. This agreement shall be governed, construed and interpreted according to the laws of the State of ———.

23. Other Provisions: ———————————————

———————————————

———————————————

In Witness Whereof, the parties hereto have executed this agreement, in duplicate, the day and year first above written.

Witness:
/s/ Lamar Jarvis

Witness:
/s/ Tony Bacon

Tennessee River Pulp & Paper Company

/s/ By Tony Bacon

Its (?) Super

/s/ Charles Smith
Contractor

Tennessee River Pulp & Paper Company

Form No. 97

(Rev. 4/17/69)

TIMBER SALES CONTRACT

Contract No. RFL989S

STATE OF Ms.
COUNTY OF WEBSTER

This agreement is entered into, in duplicate, between TENNESSEE RIVER PULP & PAPER COMPANY of Counce, Tennessee, hereinafter called the Seller, and C. Smith of Eupora, Ms., hereinafter called the Purchaser.

1. The Seller agrees to sell and the Purchaser agrees to buy the timber described as follows: Only and all Merchantable Hdw. Timber on Imes Tract in Webster County, State of Ms., which tract is more particularly described as follows: see attached plat, located in E½ of SW½ S10 T1SS R2E.

2. The Seller warrants title to said hdw. timber and agrees to defend it against all lawful claims.

3. The Purchaser agrees to pay the Seller on a MBF basis the sum per unit cut of $20.00/M Doyle Scale for all timber described above and/or covered by this contract. (Scaling of timber cut and removed will be done by Dyer Handle Co., whose principal place of business is located at ————————.) It is mutually agreed that the following scaling practices will be employed:

a. All logs will be scaled from the small end with accurate determination of the *average* diameter and length. Fractions in log diameter will be rounded to the nearest whole inch.

b. Where the Doyle rule is specified, scaler will include one bark. For other standard log rules, measurements will be taken inside bark.

c. Logs longer than sixteen feet will be scaled as two logs as near the same length as possible. The top log will be scaled as normal, and the butt log will be scaled using an assumed diameter one inch larger than the top log.

d. Scaling may be periodically checked by T. Bacon, or any authorized agent of the Seller.

e. Upon request, Purchaser agrees to furnish to the check scaler the volume scale for each load as delivered to principal points for scaling.

4. Payment will be made to Tennessee River Pulp & Paper Company and mailed to P.O. Box 581, Houston, Ms. biweekly accompanied by scale tickets or mill settlement sheet to substantiate the volume.

5. All right, title and interest in and to the timber to be purchased under this contract shall pass to the Purchaser at the time the timber has been severed.

6. The Purchaser further agrees to cut and remove said timber in accordance with the following conditions:

a. Unless written extension of time is granted, all timber described herein shall be cut and removed on or before Oct. 31, 1976. At the expiration of this date, all rights of the Purchaser under this contract shall expire.

b. No living timber shall be cut by Purchaser except that which is described in paragraph No. 1 or hardwood timber which may be designated by the Seller to be used for skid poles or roadways and bridges.

c. All trees not designated to be cut shall be protected against unnecessary damage and injury in felling, skidding or hauling operations.

d. Any trees not designated which are cut or excessively damaged shall be paid for at a rate of $20.00 per tree as liquidated damages, except in reasonable accidental cases where the Seller may waive this requirement. Additionally, all timber designated to be cut in paragraph No. 1 above and not removed, as well as all logs cut and left in the woods to the Purchaser or his agent, will be scaled and paid for by the Purchaser at the agreed price stated in paragraph No. 3 of this agreement.

e. All trees shall be severed at a point as near the ground as possible. Trees . . .

f. *All* marked or otherwise designated timber must be cut.

7. All damage caused by the Purchaser or his agents to fences, roads or other improvements of the Seller or adjacent landowners shall be replaced or paid for at replacement cost by the Purchaser.

8. The Purchaser shall cut, haul and remove said timber in accordance with proper harvesting practices, including the normal utilization of available timber.

9. The Purchaser hereby binds himself, his heirs and assigns, to keep all fire lanes, fields or pastures and roads on, or immediately adjoining, the above described property free and clear of all laps, tops, limbs, and other logging debris resulting from operations hereunder, and to remove all such logging debris from touching all uncut trees.

10. All camps, corrals or other structures erected by the Purchaser on the Seller's property shall be removed and the site restored to sanitary condition within sixty days of the termination of this contract. The location of any sawmill set on the property of the Seller shall be approved in advance by the Seller. If refuse is to be burned at the mill site, a fire lane must be established at a safe distance around the entire mill site to prevent outbreak of fires.

11. The Seller hereby expressly grants to the Purchaser the right of ingress and egress across and upon the sale area and adjacent property of the Seller of all men, materials and logging equipment, including lumber trucks, necessary for removal of said timber.

12. During the term of this contract, the Seller reserves the right to carry out other logging operations on said lands, to construct and maintain fire lanes, roads and bridges, to carry out timber stand improvement and general forest management work, and to make other uses of said lands, all in such fashion as to avoid unreasonable interference with the Purchaser.

13. The Purchaser further agrees:

a. To provide and maintain adequate protection against forest fires on the sale area during the period of this contract.

b. To suppress immediately any fires originating from acts of negligence of the Purchaser or any of his agents or employees. Upon failure on the part of the Purchaser, his employees or agents, to suppress immediately such fires, the Seller may take independent action to suppress them, the cost thereof to be borne by the Purchaser.

c. To indemnify and save harmless the Seller from all liability or claims of liability for personal injury, loss of life or property arising out of the operations of the Purchaser pursuant to this contract.

d. To comply with all Federal and State laws and regulations in connection with timber operations on the Seller's land.

14. Failure of the Purchaser to comply strictly with any and all of the foregoing terms and conditions shall give the Seller the right, at its option, to terminate this contract upon five days' written notice to the Purchaser, provided the violations complained of in said notice are not corrected within said five-day period.

15. OTHER PROVISIONS:

IN WITNESS WHEREOF, the parties hereto have executed this contract on the 30 day of July, 1975.

Witness:
TONY BACON

Witness:
TONY BACON

TENNESSEE RIVER PULP & PAPER COMPANY
Seller

By B. G. JALER

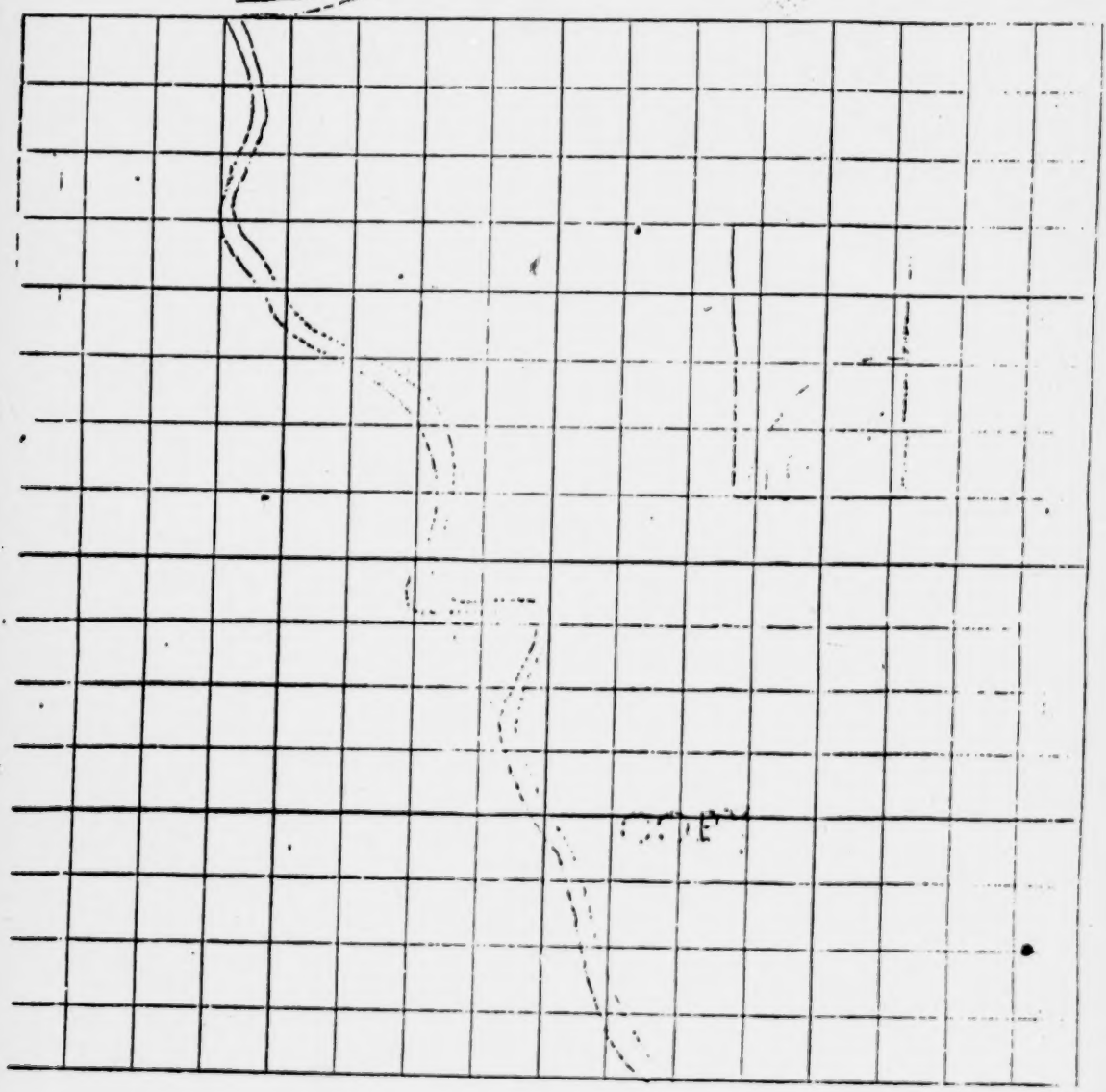
CHARLES SMITH
Purchaser

Area
County
Dist.
Comp.
Tract.
Sec. T R
By
Date

Activity
Acres
Units
Date Sch.
Date Acc.
Scale

Comments:

TENNESSEE RIVER PULP & PAPER CO.



No. 80-1438

MAR 26 1981
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TENNESSEE RIVER PULP AND PAPER COMPANY AND TRAVELERS INSURANCE COMPANY, *Petitioners,*

v.

DONALD M. SEGER, *Respondent.*

On Appeal From The Supreme Court of Mississippi

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1980

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TENNESSEE RIVER PULP AND PAPER COMPANY AND TRAVELERS INSURANCE COMPANY, *Petitioners,*

v.

DONALD M. SEGER, *Respondent.*

On Appeal From The Supreme Court of Mississippi

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Respondent, Donald M. Seger, had been employed by Charles Smith, who had been hired by the Petitioner, Tennessee River Pulp and Paper Company,

for the purpose of cutting and delivering or cutting and hauling pine timber. While engaged in such work, the Respondent was severely injured when a tree fell on him, causing him to lose the use of both of his legs.

Mr. Smith and the Petitioner had executed thirty work agreements over a two-year period, the agreements providing that the status of Mr. Smith was to be that of an independent contractor. However, the actual work relationship was more like that of employer-employee. For one thing, the Petitioner had the authority to exercise a great deal of control over the activities of Mr. Smith and his employees. Agents of the Petitioner had inspected the work site on three different occasions. They had instructed Mr. Smith to stay off the small timber, to cut all the trees low enough so that a tractor could go over them, and not to cross certain lines. According to the short term contract he had made, Mr. Smith was to trim all limbs and knots smooth with the surface of the log. His truck was required to be loaded in solid lots of pine and hardwood, and of either short wood or logs. Additional elements of control were stated as follows in the Order of the Mississippi Workmen's Compensation Commission:

> He could not mix loads, by either specimens or length. All trees had to be cut as close to the ground as reasonable [*sic*] practical. Smith was required to remove all logging debris, tops, limbs, and other debris from the roads, ditches and fire breaks on the land. He could not terminate logging operations in the natural logging area until he had logged all merchantable timber. Title to the pulpwood and trees from which the pulpwood was produced, was in and remained in Tennessee River Pulp & Paper Company. His use of the land was nonexclusive. Tennessee River Pulp & Paper Company could contract with others on the same

> tract or carry out any activity which it deemed necessary or desirable. All bulldozer work was done, when needed, by Tennessee River Pulp & Paper Company. Tennessee River Pulp & Paper Company directed the time in which Mr. Smith and his crew could haul and deliver. No deliveries could be made on holidays, plant vacations, or when Tennessee River Pulp & Paper Company was oversupplied with wood. Although no deliveries were made to the mill at Counce, Tennessee, all cutting and hauling of timber would be suspended should the operation of Tennessee River Pulp & Paper Company's mill at Counce, Tennessee, be suspended by reason of any event of force majure.

Petitioner's App. 16a, Mississippi Workmen's Compensation Commission Order. If the Petitioner was not satisfied that Mr. Smith was fulfilling his obligations, the Petitioner could simply refuse to enter into any further short term contracts.

In addition, the contract specified that the Petitioner would make weekly payments for all timber delivered during the preceding week. From each payment made, the Petitioner deducted an amount which was applied to Mr. Smith's personal bank note which financed his equipment.

Finally, Mr. Smith had been engaged in this type of work exclusively for the Petitioner for a year prior to the accident. He did not hold himself out to the public as performing an independent business. Instead, he devoted his time to employment with the Petitioner.

For these reasons, the Mississippi Workmen's Compensation Commission, the Circuit Court of Webster County, Mississippi, and the Mississippi Supreme Court (See Petitioner's Appendix for opinions) all held that

despite the language in the contract, the work relationship was that of employer-employee, and the Respondent was, therefore, entitled to workmen's compensation benefits for his injuries.

ARGUMENT

Point I: The Ruling Of The Mississippi Supreme Court Was Not In Contravention Of Article I, Section 10, Clause 1 Of The United States Constitution.

Article I, Section 10, Clause 1 of the United States Constitution provides that: "No State shall . . . pass any . . . law impairing the obligation of contracts." It is a well established principle that this provision is directed only against legislation and not against impairment by judgment of the courts. *Barrows* v. *Jackson*, 346 U.S. 249 (1953) (Court held that state court could refuse to enforce a racially restrictive covenant); *Mariniello* v. *Shell Oil Co.*, 511 F.2d 853 (3d Cir. 1976) (franchise agreement which allowed for termination of such agreement without cause was invalidated by state court); *In re Hoover*, 447 F.2d 195 (5th Cir. 1971) (court refused to enforce agreement of parties under conditional sales contract). Therefore, it is clear that the Mississippi Supreme Court's refusal to enforce strictly the provision stating that an independent contractor status was being created was not in violation of the contract clause.

Moreover, to make such a contract provision completely determinative of the type of work relationship involved would be contrary to the established law of Mississippi and numerous other jurisdictions. Mississippi law in this regard was set forth in *Boyd* v. *Crosby Lumber & Manufacturing Co.*, 250 Miss. 433,

166 So. 2d 106 (1964). The court held that in determining whether a worker is an employee or an independent contractor, two tests are considered. One test looks to the degree of control exercised over the worker, and the other examines the relative nature of the work. Regarding the latter test, the court stated:

> The latter contains these ingredients: "the character of the claimant's work or business—how skilled it is, how much of a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden and so on—and its relation to the employer's business, that is, how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job." 1 Larson, §43.52; see Comment, Employee or Independent Contractor, 26 Miss.L.J. 250 (1955).

166 So. 2d at 110. The court went on to hold that even though the contract in that case contained language to the effect that the person who hired the worker was to "have no control whatever over the matter," the actual circumstances of the relationship, not the mere language of the contract, was determinative. Accordingly, despite the language of the contract, the worker was held to be an employee since both the control test and the relative nature of the work test indicated that status. The court adopted the rationale which had been set forth earlier in *First National Bank of Oxford* v. *Mississippi Unemployment Compensation Commission*, 199 Miss. 97, 23 So. 2d 534, 535 (1945). According to the court in *Boyd*:

> If the real relationship, under such a state of facts, could be changed by a contract device such as last mentioned, employers could write themselves out

> from under nearly every workmen's compensation law or unemployment compensation statute in existence today.

166 So. 2d at 112. Therefore, the law of Mississippi and the public policy behind it regarding this matter is clear. The petitioner's contention that in the present case the provision declaring the worker's status as that of an independent contractor should be completely determinative of the question should be rejected since to determine the worker's status solely on the basis of that provision would be contrary to Mississippi law and public policy. As the cases mentioned earlier indicate, for the courts to disregard that provision does not amount to an impairment of contracts under *U.S. Const.* art. 1, §10, cl. 1. Such impairment can arise only by legislative action.

The interpretation and enforcement of contracts is traditionally within the province of state courts, and invalidation of contract clauses held repugnant to state public policy is a proper exercise of the state judicial function. *Mariniello, supra*, 511 F.2d at 858. Therefore, this Court should show great reluctance to interfere with the decision of the Mississippi Supreme Court. This is especially true in light of the fact that there is nothing unusual about the Mississippi law on this question. Numerous other jurisdictions have reached similar conclusions about provisions like that involved in the case at bar. In *Cimorelli* v. *New York Central Railway*, 148 F.2d 575 (6th cir. 1945), the court stated:

> We do not think the provision of the agreement that the Duffy Company was to perform the work as an independent contractor with exclusive supervision of the method and manner of performance is conclusive. "Neither the form of expression on the one hand, nor the name on the

> other, is conclusive. We must see what rights and privileges were in fact granted, what burdens and obligations assumed." Chicago, R. I. & P. Ry. Co. v. Union Pac. Ry. Co., C.C., 47 F. 15, 22. The spirit and purpose of an agreement, as well as its letter, must be considered in the interpretation and application of a contract. What a contract is styled by the parties does not determine its character or their legal relationship. Union Pacific Ry. Co., v. Chicago &c R. Co., 163 U.S. 564, 582, 16 S.Ct. 1173, 41 L.Ed. 265.

Id. at 578. *Cimorelli* was relied on in *Moore* v. *Chesapeake & Ohio Railway*, 493 F. Supp. 1252, 1262 (S.D.W. Va. 1980), to reach the same conclusion. *See also Scheuer* v. *Central States Pension Fund*, 358 F. Supp. 1332 (E.D. Wis. 1973); *Manahan* v. *Daily News - Tribune*, 50 Ill. App. 3d 9, 365 N.E.2d 1045 (1977); *Smith* v. *Department of Employment*, 62 Cal. App. 3d 206, 132 Cal. Rptr. 874 (1976); *Hendrix* v. *City of Maryville*, 58 Tenn. App. 457, 431 S.W.2d 292 (1968); *Humphreys* v. *Texas Power & Light Co.*, 427 S.W.2d 324 (Tex. Civ. App. 1968).

Point II: No Violation Of The Petitioner's Due Process Rights Results From The Mississippi Supreme Court's Affirmation Of The Lower Court's And Full Commission's Actions.

It is clear that under Mississippi law the Workmen's Compensation Commission is to be the finder of facts in workmen's compensation cases. In *Bruton* v. *Mississippi Workmen's Compensation Commission*, 253 Miss. 694, 178 So. 2d 673 (1965), the court stated:

> It is a well established rule of law in this state, as shown by numerous decisions of this Court, that the Mississippi Workmen's Compensation Commis-

> sion, and not the attorney referee, is the trier of facts in compensation cases. Harbert Constr. Corp. v. Hughes, 250 Miss. 858, 168 So. 2d 506 (1964) and cases therein.

178 So. 2d at 675.

In its capacity as finder of fact, the Commission carefully examined the record of the proceeding below, heard arguments from counsel, and then made the determination which it is authorized by law to make. Subsequently, the Circuit Court of Webster County, Mississippi, and the Mississippi Supreme Court affirmed that decision. The courts of Mississippi having upheld the validity of the determination of the Commission, this Court should do the same. As stated in *Bell* v. *State of Maryland*, 378 U.S. 226 (1964), the Court has a tradition of deference to state courts on questions of state law. *Id.*, at 237. The courts of Mississippi correctly found no due process violations, and this Court should be extremely reluctant to reach a contrary conclusion.

CONCLUSION

The Respondent respectfully requests that the court deny the Petitioner's request for a Writ of Certiorari since there are no special and important reasons for granting the Writ as required by *Sup. Ct. R.* 17(1).

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